IN THE

SUPREME COURT OF THE UNITED STATES

NO. 87-5765

KEVIN N. STANFORD,

Petitioner,

V.

COMMONWEALTH OF KENTUCKY,

Respondent.

ORIGINAL

REPLY TO BRIEF IN OPPOSITION

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CERTIFICATE

I hereby certify that a copy of this Reply was served, by depositing the same in a United States mailbox, with first class postage prepaid, to Hon. David A. Smith, Assistant Attorney General, Capitol Building, Frankfort, Kentucky 40601, Counsel for Respondent, on January 11, 1988.

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REPLY TO BRIEF IN OPPOSITION

Comes the petitioner, Kevin N. Stanford, pursuant to Rule 22.5 of the Rules of this Court, and for his reply to the respondent's brief in opposition, states as follows:

ARGUMENT[1]

I. THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS ARE VIOLATED WHEN A STATE APPELLATE COURT, IN A CAPITAL CASE, ADOPTS A NEW RULE OF ERROR PRESERVATION THAT ADVANCES NO LEGITIMATE STATE INTEREST AND CONSTITUTES A SUBSTANTIAL DEPARTURE FROM PREVIOUSLY WELL-ESTABLISHED RULES GOVERNING PRESERVATION OF ERROR.

APPLICATION OF THIS NEW RULE OF ERROR PRESERVATION TO THE PETITIONER'S CASE VIOLATES DUE PROCESS OF LAW.

The respondent merely views the trial court's action as limiting the number of questions that would be asked during the individual voir dire examination. (Brief in Opposition, p. 7). That view is simply incorrect. The trial court indicated that only one question would be asked during the individual voir dire examination to determine the qualifications of jurors to participate in a capital case. (TE 3-1-82, 10-12; Appendix to Certiorari Petition, hereafter App., 70-72). The trial court indicated that the jury would be "death-qualified" at the completion of the individual voir dire examination. (TE 3-1-82, 22-23). Defense counsel was unequivocally told by the trial judge that the tendered questions which counsel wanted asked to determine the juror's qualifications to participate in the capital case were overruled. (TE I, 39; App., 85).

The respondent attempts to characterize the trial court's action as a mere violation of a Kentucky Rule of Criminal Procedure. (Brief in Opposition, p. 7). A juror's qualifications to participate in a capital case could not be determined solely by responding to the

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1. For the purpose of this reply, the petitioner finds no need to address Arguments II, VI and VIII as presented in his Petition for a Writ of Certiorari. Accordingly, the petitioner continues to rely on the arguments made therein as grounds for granting the writ.

single question asked by the trial judge.2 Indeed, the single question asked by the trial judge is only a threshhold inquiry to determine the juror's ability to serve in a capital case. The question obviously does not address the issue of whether an individual juror would automatically impose the death penalty regardless of the circumstances of a particular case.3 The trial court left no doubt that one and only one question would be asked by which to determine the juror's qualifications to participate in a capital case. Defense counsel's request to have the proposed questions asked was overruled. (TE I, 39; App., 85). The trial court's ruling plainly prevented defense counsel from asking any of the tendered questions regarding the death penalty.

The respondent suggests that defense counsel, by asking some of the questions on his list during the general voir dire examination, construed the Court's ruling as simply being "an allocation of topics between individual and collective voir doire." (Brief in Opposition, p. 8). Thus, the respondent concludes that defense counsel did not view the trial court's ruling as a bar to asking questions during the general voir dire examination concerning the juror's qualifications to participate in a capital case. *The respondent's analysis is fatally flawed. The fact that defense counsel asked the trial judge to incorporate pre-trial publicity in the individual voir dire examination (TE I, 39) and the fact that defense counsel questioned the jurors concerning reasonable doubt and the accused's right not to testify, during the general voir dire examination, has no bearing on the issue at hand. The trial judge, as noted above, unequivocally overruled defense counsel's tendered questions on the issue of capital

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2. The question asked by the trial judge was:

> "Do you have any personal conviction against imposing the death penalty, such that you could not consider it under the circumstances in this or any other case and regardless of what the evidence may be?"

(TE I, 38, 65-78; TE II, 151-207).

3. The Kentucky Supreme Court recognized that it is proper for defense counsel to attempt to "life-qualify" the jury in a capital case. Stanford v. Commonwealth, Ky., 734 S.W.2d 781, 786 (1987).

punishment. As defense counsel stated "We have tendered proposed questions to the capital phase which I take it are overruled?" The trial judge responded, "Yeah." (TE I, 39; App., 85). Thus, defense counsel's inquiry as to the extent of the trial court's ruling was just as specific as the trial court's ruling. The fact that defense counsel asked questions during the general voir dire about reasonable doubt and the accused's right not to testify is simply irrelevant. The record reflects that the trial court did in fact impose a blanket restriction which precluded defense counsel from asking his proposed questions on the issue of capital punishment. The questions which are at issue here were not asked because of defense counsel's adherence to and compliance with the trial court's unequivocal ruling. Neither the record nor the Kentucky Supreme Court's opinion herein support the conclusion that defense counsel's failure to ask the tendered questions during the general voir dire examination constituted a deliberate trial tactic.

The respondent seeks to avoid the federal constitutional issue by concluding that the ruling of the Kentucky Supreme Court rests on independent state grounds. (Brief in Opposition, p. 9). Yet, the respondent cites nothing in the opinion of the Kentucky Supreme Court to support such a conclusion and indeed concedes that "the opinion does not contain a plain statement that this ruling is based upon Kentucky law . . .". (Brief in Opposition, p. 9). The parameters of the federal constitutional issue involved here are adequately set forth in the petition for a writ of certiorari and the petitioner will not reiterate them here.

The respondent further argues it was a procedural default by defense counsel that led to a denial of the relief sought by the petitioner. (Brief in Opposition, p. 9). Assuming, without conceding, that a procedural default occurred, the petitioner submits that such a default does not prevent vindication of the federal constitutional rights of an accused unless a legitimate state interest is served by the State's insistence on compliance with its procedural rule. Henry v. Mississippi, 379 U.S. 443, 447 (1965). Counsel has a duty to follow and obey the orders and rulings of a court. See

Leibson v. Taylor, Ky., 690 S.W.2d 721 (1986). That is precisely what defense counsel did in this case. The effect of the opinion of the Kentucky Supreme Court was to promulgate a new rule of procedure. As noted in the petition for a writ of certiorari, this rule serves absolutely no legitimate state interest. Therefore, imposition of the death penalty upon the petitioner because of enforcement of this new procedural rule constitutes a denial of due process and is fundamentally unfair.

III. THE EIGHTH AND FOURTEENTH AMENDMENTS WERE VIOLATED BY EXCLUDING, DURING THE PENALTY PHASE OF A CAPITAL CASE, MITIGATING EVIDENCE PRESENTED BY A FORMER DEATH ROW INMATE WHO WORKED AS A JUVENILE COUNSELOR AND COULD OFFER TESTIMONY, NOT ONLY ABOUT HIS PERSONAL EXPERIENCE WITH THE PETITIONER PRIOR AND SUBSEQUENT TO THE ALLEGED CRIMES, BUT WHO COULD ALSO TESTIFY ABOUT THE REHABILITATIVE PROGRAMS OFFERED WITHIN THE ADULT PENAL SYSTEM.

It should be noted that the respondent did not argue in its brief filed in the Kentucky Supreme Court that the exclusion of the mitigating evidence offered by Robert Jones was harmless error. (A copy of pp. 60-63 of the respondent's brief in the Kentucky Supreme Court is attached. See A1-4). In its opinion, the Kentucky Supreme Court did not consider whether the error could be harmless. Stanford v. Commonwealth, 734 S.W.2d at 788-790.

The evidence offered by Jones was not cumulative because it came from a very unique prospective that was not shared by any other mitigation witness. As a former death row inmate, Jones could testify from first-hand experience about the security, rehabilitative, educational and vocational opportunities offered by the adult penal system. As noted in the petition for a writ of certiorari, Jones was able to relate that testimony directly to the petitioner with whom he had contact as a youth counselor prior and subsequent to the alleged crimes.

IV. THE FIFTH AND FOURTEENTH AMENDMENTS REQUIRE THAT A JURY BE INSTRUCTED IN THE PENALTY PHASE OF A CAPITAL CASE THAT THE ACCUSED IS NOT REQUIRED TO TESTIFY AND THAT NO ADVERSE INFERENCE CAN BE DRAWN FROM HIS SILENCE.

Only by reading Kentucky Rule of Criminal Procedure (RCr 9.54(2)) out of context can the respondent reach the conclusion that defense counsel's request for a "no adverse inference" instruction in the penalty phase was not properly presented to the trial judge.

At the time of the petitioner's trial, RCr 9.54(2) provided:

> No party may assign as error the giving or the failure to give an instruction unless he has fairly and adequately presented his position by an offered instruction or by motion, or unless he makes objection before the Court instructs the jury, stating specifically the matter to which he objects and the ground or grounds of his objection.

In the case at bar, defense counsel complied with the foregoing rule by tendering his proposed instructions to the trial court. (TE X, 1365). A "no adverse inference" instruction was contained in the instructions tendered by defense counsel for the beginning of the penalty phase hearing and for the end of the penalty phase hearing. (A copy of those tendered instructions is attached. See A-6 and A-7). By tendering the aforementioned instructions to the trial judge, defense counsel did all that he was required to do under Kentucky law. Only by misreading the former version of RCr 9.54(2) can the respondent include otherwise.

RCr 9.54(2) was amended effective January 1, 1985. The change in the rule unequivocally demonstrates that defense counsel not only preserved the issue for review in conformance with Kentucky law but also reflects the respondent's misreading of RCr 9.54(2). The present version of said rule provides:

> Any party may tender instructions but no party may assign as error the giving or the failure to give an instruction unless he makes specific objections to the giving or the failure to give an instruction before the Court instructs the jury, stating specifically the matter to which he objects and the ground or grounds of his objection.

The former version of RCr 9.54(2) makes it clear that at the time of the petitioner's trial there were three methods by which to preserve

for appellate review an alleged instructional error, i.e. by motion, by tendering instructions, or by making a specific objection. The amended version of RCr 9.54(2) [eff. 1-1-85] makes it clear that the only way to preserve an instructional error for appellate review at the present time is to make a specific objection. Thus, defense counsel at the time of the petitioner's trial fully complied with the demands of Kentucky procedural law and the issue was preserved for appellate review.

The respondent's reliance on Long v. Commonwealth, Ky., 559 S.W.2d 482 (1977) is misplaced. There, the Kentucky Supreme Court held that the defendant's tendered instruction on self-defense was an erroneous statement of Kentucky law. On appeal the defendant argued that the instruction given by the trial court on self-defense was erroneous. However, at trial the defendant merely stated that he objected to the trial court's failure to give his tendered instruction on self-defense. The Kentucky Supreme Court held that the alleged error was not preserved for appellate review under the provisions of that version of RCr 9.54(2) which was in effect at the time of the petitioner's trial. The essence of the Kentucky Supreme Court's decision was that the instructions given by a trial judge cannot be challenged on appeal by a defendant whose own instructions on the subject were an erroneous statement of Kentucky law. That is a far different matter than the situation presented in the case at bar.

As noted above, defense counsel did all that he was required to do under RCr 9.54(2) in order to preserve the issue for appellate review herein. Moreover, the Kentucky Supreme Court never made any finding that defense counsel did not properly preserve this issue for appellate review. Indeed, the Court stated, with regard to issues not addressed in its opinion, that they either "do not warrant detailed discussion" or "are unpersuasive, not because of their argument, but because of their lack of legal substance." Stanford v. Commonwealth, 734 S.W.2d at 792-793. Therefore, there is no merit to the respondent's argument that defense counsel failed to properly preserve this issue for appellate review.

V. THE EIGHTH AND FOURTEENTH AMENDMENTS REQUIRE THAT THE JURY BE INSTRUCTED DURING THE PENALTY PHASE OF A CAPITAL CASE THAT THE DEATH SENTENCE NEED NOT BE IMPOSED EVEN IF AN AGGRAVATING CIRCUMSTANCE IS PROVED BEYOND A REASONABLE DOUBT.

The petitioner's discussion of the manner of preservation of error of instructional issues presented in Argument IV above is equally applicable to this argument and is therefore incorporated by reference without further reiteration.

The petitioner submits neither Instruction No. 3 (TR 82CR0406, Vol. III, 311; TE XI, 1407; A-8) nor Instruction No. 4 (TR 82CR0406, Vol. III, 312; TE XI, 1507-1508; A-9) advise the jury that it can find the existence of an aggravating circumstance and still return a verdict other than the death sentence. Instruction No. 3 advised the jury that a sentence other than death could be imposed if the aggravating circumstances outnumbered the mitigating circumstances or if no mitigating circumstances existed.[4] However, the instruction is fatally flawed insofar as it does not inform the jury that it could impose a sentence other than death even if it found only aggravating circumstances to exist.

Instruction No. 4(a) advises the jury to make no finding on the aggravating circumstances if it has a reasonable doubt as to their existence and Instruction No. 4(b) informs the jury that if it has a reasonable doubt that the petitioner should be sentenced to death then he should be sentenced to imprisonment. Neither instruction can be reasonably construed as informing the jury that a sentence other than death can be imposed even if the aggravating circumstance is proved beyond reasonable doubt. Moreover, the prejudice of the court's failure to give the tendered instruction of defense counsel (App. 60-61) must be examined in conjunction with the very substantial

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4. The respondent erroneously phrased the instruction as follows: "[I]f you believe the number of aggravating circumstances are weaker than the number of mitigating circumstances . . ." (Brief in Opposition, p. 24). The correct form of the instruction reads: "[I]f you believe the number of aggravating circumstances are greater than the number of mitigating circumstances . . ." (TR 82CR0406, Vol. III, 311; TE XI, 1507).

prejudice caused by the verdict forms provided to the jury (TR 82CR0406, Vol. III, 314; App. 142). The effect of those verdict forms is to leave the jury no choice but to impose the death penalty if it finds an aggravating circumstance to exist.

VII. THE SIXTH AND FOURTEENTH AMENDMENTS ARE VIOLATED IN A JOINT TRIAL BY THE ADMISSION OF THE STATEMENT OF A NON-TESTIFYING CO-DEFENDANT WHICH MAKES REFERENCE TO THE PETITIONER AS "THE OTHER PERSON" AND THE JURY IS NOT ADMONISHED THAT THE STATEMENT CANNOT BE USED AS EVIDENCE OF THE PETITIONER'S GUILT.

Because the words "some other person" were substituted for the petitioner's name when a statement made to a police officer by the non-testifying co-defendant, David Buchanan, was admitted into evidence, the respondent concludes that the confession "while it alluded to the existence of an accomplice, did not directly or facially implicate Petitioner as a participant in the crimes." (Brief in Opposition, p. 33). Such a conclusion defies common sense and reason especially, where as here, the confession is introduced during the joint trial of two co-defendants. Under such circumstances, there simply could have been no doubt in the minds of reasonable jurors as to the identity of "the other person". It is hardly likely that any juror would have considered Troy Johnson to be "the other person" especially in light of the fact that he testified at trial and explained his knowledge of the events in question.

The respondent's assertion that defense counsel believed an admonition regarding the use of Buchanan's statement would backfire by focusing attention on the petitioner is not supported by the record as the following colloquy from the pertinent bench conference indicates (TE IV, 482-483):

> (WHEREUPON, the following discussion was had at the bench out of the hearing of the Jury:)
>
> DEFENSE COUNSEL: We would object on behalf of Kevin Stanford, we would object to anything that David Buchanan said to Detective Hall in the car because that would deny us our right of cross examination.
>
> PROSECUTOR: Judge, I have advised this officer to say blank or another person when they get

> to something with his name in it. Now, in order to enforce, per se, why don't we just bring him around and the Court can advise him again.
>
> DEFENSE COUNSEL: That is an accepted way of dealing with it. My problem is that it's easy enough to figure out what's going on from the Jury's view point. I think they know who the blanks are.
>
> THE COURT: Well, I don't know whether they do or not. You're saying they can speculate. I can't deal with speculation. All I can deal with is evidence. I can protect you again by not putting in anything about your client's name, that's why I'd overrule you, but I will caution him if you wish me to, so that he is sure to say some other
>
> DEFENSE COUNSEL: We would at least want you to caution him.
>
> THE COURT: Officer, would you come forward?
>
> DETECTIVE HALL: Yes, sir.
>
> (WHEREUPON, Detective Jerry Hall approached the bench and the following discussion was had out of the hearing of the Jury:)
>
> THE COURT: I just want to caution you about a requirement of Bruton which is, no identification of any other person except David in this statement.
>
> PROSECUTOR: David Buchanan or Troy Johnson.
>
> THE COURT: Say some other person or another person.

As the foregoing excerpt from the trial transcript indicates, defense counsel did not mention anything about an admonition but merely expressed his view that deletion of the petitioner's name and reference to him as some other person would not prevent the jury from determining his identity from the context of Buchanan's statement.

CONCLUSION

For the foregoing reasons, the petitioner, Kevin N. Stanford, prays that this Court grant his petition for a writ of certiorari and review the decision of the Kentucky Supreme Court.

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XVIII.

THE PROPOSED TESTIMONY OF ROBERT JONES WAS PROPERLY EXCLUDED.

During the penalty phase of the trial, Appellant called Robert Jones to testify. (TE 1483). The Commonwealth objected to his testimony as irrelevant because it was too narrowly focused upon Mr. Jones' experiences while he was on death row. (TE 1485-1486). Defense counsel argued that Jones should be allowed to give his philosophical opinion of whether the death penalty should be rendered, with his knowledge of Appellant. (TE 1485). The trial court tentatively sustained the objection, subject to change after hearing Jones' testimony on avowal (TE 1486-1487).

During this avowal testimony, Mr. Jones noted that he had been associated with four programs which dealt with juveniles (TE 1488). Mr. Jones was also Vice-Chairman of the Kentucky Coalition Against the Death Penalty (TE 1488-1489). From his testimony, it is apparent that his primary function was to gather information concerning the death penalty and to travel around the country speaking out against the death penalty (TE 1489-1490, 1492-1493, 1496). During his avowal testimony, Mr. Jones vocalized his opposition to the death penalty in general, relating this to his personal experience and philosophy and to the philosophies of other speakers, specifically the widow of Martin Luther King (TE 1490, 1492-1497). Mr. Jones testified that he had become acquainted with Appellant while Jones was a youth counsellor at the Children's Center, during 1978 and 1979; however, Jones did not state that he

had talked to Appellant during this period about the offense or about Appellant's history/problems. (TE 1490-1491). Jones did talk to Appellant on at least one occasion during the week prior to trial, at the request of Appellant's attorney. (TE 1491). The superficial nature of this interview is shown by Jones' comment, ". . . I've heard that Kevin had a drug problem." (TE 1493). In any event, the only testimony by Jones specifically related to Appellant was that, in Jones' opinion, incarceration in an adult institution would be more appropriate because such an institution would provide control and rehabilitation programs (TE 1491-1492, 1494).

At the conclusion of Jones' avowal testimony, the trial court ruled that Jones was not qualified to give his opinion concerning Appellant's chances for rehabilitation and that his testimony was merely cumulative, at best. (TE 1498-1500).

Appellant claims that exclusion of this testimony was error because it precluded him from essential evidence in mitigation. Appellant suggests that the trial court must allow any and all testimony that a defendant labels "mitigating." The Commonwealth would submit that the trial court must have some control over evidentiary matters, even in a capital proceeding. The Commonwealth would further submit that the trial court properly exercised that control by excluding this evidence because the bulk of this testimony was not relevant testimony and the meager portion pertaining specifically to Appellant was cumulative.

Appellant relies to a good degree upon Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). However, in Lockett, the United States Supreme Court noted, "Nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." Id. at 604. The bulk of Jones' proffered testimony consisted simply of his experiences on death row and a philosophical diatribe against the death penalty in general. In a similar situation in Franklin v. State, Ga. 263 S.E.2d 666 (1980), the Georgia court ruled that such testimony is not admissible as evidence in mitigation. Id. at 672-673. The trial court properly excluded this portion of Jones' testimony because it was not relevant to Appellant's character, his prior record, or the circumstances of his offense. Lockett and Franklin, supra.

In Matthews v. Commonwealth, Ky., ___S.W.2d ___(Rendered September 27, 1985, Petition for Rehearing Pending), this Court ruled that certain evidence offered in mitigation was properly excluded because it was too remote in time. The Commonwealth would submit that trial courts may also properly exclude evidence offered in mitigation because it is merely cumulative to evidence already received on a certain point(s). As noted earlier, Jones' testimony concerning Appellant specifically was that an adult penal institution would be the more appropriate remedy for him because such an institution provides control and rehabilitative programs. This information had been presented to the jury through earlier

witnesses. Stephen Smith testified about the rehabilitative programs available at adult penal institutions (TE 1379-1381). Dana Mattison, James Berry, Linda Luking and Lloyd Davis testified that Appellant had the potential for rehabilitation (TE 1411-1412, 1425, 1445-1446). Both Ms. Mattison and Ms. Luking indicated that Appellant needed some form of control in his environment (1411-1412, 1439-1443). Finally, Mr. Davis testified that Appellant could be rehabilitated in the penal system (TE 1468). As the Court can see, the minimal amount of Jones' testimony which was relevant was merely cumulative in nature. Weighed against the bulk of his proffered testimony which was not proper for the jury's consideration, this evidence was also properly excluded. Shepherd v. Commonwealth, Ky., 327 S.W.2d 956 (1959).

Moore v. Commonwealth, Ky., 634 S.W.2d 426 (1982) is easily distinguished because the evidence excluded in that case was both relevant and was being offered for the first time by that witness.

The judgment should be affirmed.

XIX

ANY PREJUDICE CAUSED BY THE PROSECUTOR'S QUESTION TO GEORGE BOLLER WAS CURED BY THE COURT'S ADMONITION.

During the penalty phase of the trial, Appellant's former step-father was called by the defense (TE 1389-1391). During his testimony, Mr. Boller stated that Appellant had told Boller that he was going to get his life straightened out because his girlfriend was going to have his baby (TE 1389). During cross-examination,

NO. 82CR0406 JEFFERSON CIRCUIT COURT
DIVISION NINE

COMMONWEALTH OF KENTUCKY PLAINTIFF

VS. PROPOSED INSTRUCTIONS FOR PENALTY PHASE

KEVIN N. STANFORD DEFENDANT

* * *

INSTRUCTION NO. ____

INSTRUCTION AT BEGINNING OF HEARING

Ladies and gentlemen of the jury, you have tried the defendant and returned a verdict finding him guilty of Murder, _____ _____. From the evidence placed before you in that trial you are acquainted with the facts and circumstances of the crime itself. You will now receive additional evidence from which you shall determine whether there are mitigating or aggravating facts and circumstances bearing upon the question of punishment, following which you shall recommend a sentence for the defendant. In considering such evidence you will bear in mind the same instruction that was given to you in the first stage of this trial proceeding, to the effect that the law presumes the defendant innocent unless and until you are satisfied from the evidence beyond a reasonable doubt that he is guilty, and you shall apply that same presumption in determining whether there are aggravating circumstances bearing on the question of what punishment should be adjudged against him in this case. You are also instructed that even if you believe that the aggravating circumstances alleged have been proven beyond a reasonable doubt you may still nevertheless in your discretion recommend a sentence other than death. A finding that the aggravating factors

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do exist does not mean that you must give the death penalty to Kevin N. Stanford. The question of whether Kevin N. Stanford is put to death is left in your discretion. In order to recommend the death sentence you must believe that at least one of the aggravating factors do exist beyond a reasonable doubt. However, you are not required to make any such specific findings if you return a verdict of punishment of a term of 20 years or more in the penitentiary or for a term of life in the penitentiary. You must consider all the evidence which is presented to you in this hearing. You do not have to make a unanimous finding of fact on any of the evidence unless you are recommending the death penalty in which you must unanimously find that one or more of the aggravating factors have been proven beyond a reasonable doubt and must unanimously agree on that punishment.

As with the trial in chief, the burden of proof herein lies with the prosecutor. The defendant is not required to testify and you cannot hold it against him if he chooses not to testify.

Pursuant to the verdict returned by you finding the defendant guilty of Murder, and under the evidence presented to you in both stages of this trial proceeding you shall recommend to the Court at the conclusion of your deliberations after this hearing one of the following three verdicts:

1. A term of 20 years or more in the penitentiary;
2. A term of life imprisonment in the penitentiary;

OR

3. Death by electrocution.

NO. 82CR0406

JEFFERSON CIRCUIT COURT
DIVISION NINE

COMMONWEALTH OF KENTUCKY — PLAINTIFF

VS. DEFENDANT'S PROPOSED INSTRUCTIONS AT END OF PENALTY PHASE

KEVIN N. STANFORD — DEFENDANT

* * *

INSTRUCTION NO. _____

REASONABLE DOUBT

If you have a reasonable doubt as to the truth or existence of any one of the aggravating circumstances you shall not make a finding with respect to it. If upon the whole case you have a reasonable doubt as to whether the defendant should be sentenced to death you shall recommend a sentence of imprisonment instead. Even if you believe the aggravating circumstances exist beyond a reasonable doubt you are not bound to return a finding of death. You are free in your discretion to give Kevin Stanford the benefit of life in prison or imprisonment of not less than 20 years in your discretion. A return of a sentence of imprisonment does not require any finding by you concerning any mitigating circumstances but may be made solely in your discretion. You are further instructed that Kevin Stanford is not required to testify in the penalty phase hearing. His election not to testify cannot be construed as having any weight against him, nor shall you consider that fact against him.

INSTRUCTION NO. III - AUTHORIZED SENTENCES

You may recommend that the defendant be sentenced (a) to confinement in the penitentiary for a term of twenty (20) years or more; (b) to confinement in the penitentiary for life; or (c) to death, in your discretion, but you cannot recommend that he be sentenced to death unless you are satisfied from the evidence beyond a reasonable doubt that at least one of the statements listed as (a) and (b) in Instruction No. I (Aggravating Circumstances) is true in its entirety, in which event you must designate in writing, signed by the foreman, which of the aggravating circumstances you found beyond a reasonable doubt to be true.

You are further instructed that a sentence of life or term of twenty (20) years imprisonment or more can be returned even if you believe the number of aggravating circumstances are greater than the number of mitigating circumstances, or even if you believe that no mitigating circumstances exist.

INSTRUCTION NO. IV - REASONABLE DOUBT

(a) If you have a reasonable doubt as to the truth or existence of any one of the "aggravating circumstances" listed in Instruction No. I, you shall not make any finding with respect to it.

(b) If upon the whole case you have a reasonable doubt whether the defendant should be sentenced to death, you shall recommend a sentence of imprisonment instead.